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CHIN MEE KEONG & ORS

v.

PESURUHJAYA SUKAN

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COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
LOW HOP BING JCA
SURIYADI HALIM OMAR JCA
[CIVIL NO APPEAL: W-01-70-2005]

C

26 JANUARY 2007

ADMINISTRATIVE LAW: *Judicial review - Certiorari, application for leave - Revocation of registration of sports body by Commissioner of Sports - Locus standi - Alternative remedy - Whether could be*

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circumvented - Whether ought to be considered at leave stage - Exceptions - Breach of natural justice - Whether application ought to be refused in limine - Sports Development Act 1997, ss. 20(1)(e), 21(1)(c) - Rules of the High Court 1980, O. 15 r. 12(1), O. 53 rr. 2(4), 3(1), (2)

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UNINCORPORATED ASSOCIATIONS: *Unincorporated associations - Judicial review - Revocation of registration of sports body by Commissioner of Sports - Locus standi - Alternative remedy - Whether could be circumvented - Whether ought to be considered at leave stage - Exceptions - Breach of natural justice - Whether application ought*

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to be refused in limine - Sports Development Act 1997, ss. 20(1)(e), 21(1)(c) - Rules of the High Court 1980, O. 15 r. 12(1), O. 53 rr. 2(4), 3(1), (2)

The appellants, on their own, and on behalf of the Malaysian Taekwondo Association ('MTA'), applied under O. 53 r. 3(2) of

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the Rules of the High Court 1980 ('RHC') for leave to apply for an order of *certiorari* to remove a "Show Cause Order" dated 15 April 2005 issued by the respondent, and quash the order issued by the respondent on 6 May 2005 revoking the registration of the MTA. The appellants were the President, Vice Presidents,

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Secretary and Treasurers respectively of the MTA, the only taekwondo association (out of three in this country) recognized by the Olympic Council of Malaysia to represent the sport of taekwondo in this country. The MTA had 17 full voting members representing 13 states, two Federal Territories and one member

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each for two organisations *viz.* the Malaysian Armed Forces and the Malaysian Universities Sports Council. Aside from these members who had representative voting rights, there was another

category of membership known as associate members – from various taekwondo associations across the country – who did not have representative voting rights. Due to their lack of such rights, they had, according to the appellants, applied pressure on the respondent to change its constitution to allow them to vote.

When the members of the MTA resisted, the respondent, on 15 April 2005, issued a show cause letter to the MTA demanding to know why the MTA should not be de-registered under s. 20(1)(e) of the Sports Development Act 1997 ('Act'). Then, on 6 May 2005, when the respondent refused to accept the explanation provided by the MTA in response to the show cause letter, the respondent issued an order to de-register the MTA. The appellants could have appealed to the Minister of Sports ('Minister') against the respondent's decision but instead elected to file this application in the High Court for judicial review, contending that: (i) the appeal to the Minister was not mandatory since the wording of s. 21(1) of the Act provided the appellants with the option of either appealing to the Minister or seeking an alternative remedy to challenge the decision of the respondent; and (ii) it was futile to appeal to the Minister since the Minister was biased and prejudiced against the current stand of the MTA. The High Court dismissed this application principally on the ground that the appellants had an alternative remedy under s. 21(1)(c) of the Act to appeal to the Minister, and that it was premature to judge the Minister for being biased and prejudiced when she had not even heard the appeal. This was the appellants' appeal against the High Court's decision. Before considering the substantive issues of this appeal, a preliminary matter raised by the respondent *ie*, that the appellants had no *locus standi* to make this application since they were not authorized persons to sue for and on behalf of the MTA, had to be dealt with.

Held (allowing the appeal)
Per James Foong JCA delivering the majority judgment of the court:

(1) An association cannot sue in it own name. Preferably, an action should be commenced by its registered public officer. If none is registered as such, then it is permissible for any office bearer of the association to mount a claim for and on behalf of its members. This would put him on the same footing as a representative for others having the same interest in the proceeding, which is permitted under O. 15 r. 12(1) of the

RHC. In this instance, the appellants did exactly that. They were office bearers of the MTA and they sued in their own names as committee members of the MTA. This meant that they were representing the members of the MTA by virtue of them being elected by the latter to such position. Although only six out of ten committee members brought this action, this was immaterial as even a single member could represent other members. Further, under O. 53 r. 2(4) of the RHC there is no restriction on the capacity of the person making an application for judicial review except that he must be adversely affected by the decision of the public authority who made the decision under review. The appellants, being members of the MTA, were certainly persons who were adversely affected by the decision of the respondent; as such, they should be allowed to seek relief from the court. (paras 22 & 23)

(2) To summarily assign the issue of an alternative remedy to a subsequent stage for consideration after leave has been granted would mean that even cases which are bound to fail *in limine* on the issue of availability of an alternative remedy would automatically be permitted at leave stage. There are only limited exceptions to the general rule that judicial review is not available where there is an alternative remedy by way of appeal, and to ignore this at leave stage and allow all cases of such nature to proceed to the second stage after leave is granted would go beyond established principles, particularly that of *Mohamed Nordin Johan v. Attorney General, Malaysia* which is a Federal Court case and the Supreme Court decision in *J.P. Berthelsen v. Director-General of Immigration, Malaysia & Ors* which repeatedly state that the test is whether the application for leave is frivolous to merit the refusal of leave *in limine*. If the issue of an alternative remedy is raised at leave stage, it must still be considered in the light of this established test rather than leaving it completely for evaluation at the substantive hearing of the motion of *certiorari* after leave has been granted. (para 31)

(3) In the circumstances of this case, there was neither a clear lack of jurisdiction nor a blatant failure to perform some statutory duty on the part of the respondent. However, judging from the appellants' allegations, particularly that the Minister was biased, prejudiced and had prejudged the subject matter of the appeal that may be brought before her under

s. 21(1)(c) of the Act, there would be a breach of the principles of natural justice if the Minister was as alleged. One cannot envisage a person sitting in judgment to be fair and unbiased if he or she had fully participated in the dispute between the parties and had influenced the decision which is the subject matter of the hearing before him or her. This certainly opposes the requirement that the arbiter must be fair and impartial. Indeed, these allegations against the Minister were not proven but at this stage of the proceeding the court was not concerned with an in-depth search for the truth. That should be undertaken at the next level, after leave is granted, when the matter can be fully investigated. At this stage, all that was necessary was for the court to consider, based on what was disclosed by the appellants, whether there was an arguable case in favour of granting an order of *certiorari*. (para 34)

(4) Having perused the grounds of judgment of the learned Judicial Commissioner ('JC'), it was clear that she had erred in two aspects. Firstly, her failure to recognise that the application before her only required an evaluation of the allegations of the appellants as to whether further investigation was required in deciding whether to grant or refuse an order of *certiorari*. Secondly, on the allegations as presented by the appellants, she had failed to appreciate that there could be a breach of natural justice if the Minister were to hear the appeal brought by the appellants under s. 21(1)(c) of the Act. This by itself would constitute an exception to the general rule that judicial review is not an option when there is an alternative remedy available by way of appeal. The appellants' application was, therefore, not frivolous and vexatious to justify refusal of leave *in limine*. (para 36)

Per Low Hop Bing JCA (dissenting):

(1) In the light of the judgment of the Federal Court in *Pengurusan Danaharta Nasional v. Tang Kwor Ham & Ors and Another Appeal*, the High Court is at liberty and indeed duty-bound to consider any point raised, including the alternative remedy point, at the first stage of leave application under O. 53 r. 3(1) of the RHC. The consideration of whether leave should be granted or refused *in limine* involves an exercise of discretion according to established judicial principles, having

regard to all the facts and circumstances of each particular case. In this connection, it needs to be observed that where there was an appeal provision available to the appellants herein, *certiorari* should not normally issue unless the appellants could discharge the burden of proving any of the following exceptional circumstances: (a) there was a lack of jurisdiction on the part of the Commissioner of Sports ('Commissioner') in relation to the decision complained of *ie*, the revocation order; (b) there was a blatant failure by the Commissioner to perform some statutory duty; (c) the Commissioner had committed a serious breach of the principles of natural justice; or (d) illegality. Upon a proper perusal of the factual background of this case, the appellants had failed to establish any of the above exceptional circumstances against the Commissioner. Most importantly, the Commissioner, by issuing the show cause letter to the appellants, had given them an opportunity of being heard. That was clearly in compliance with the fundamental rules of natural justice. On the part of the Commissioner, there was not an iota of a breach, less so a serious breach, of the fundamental principles of natural justice. (paras 77, 78, 79 & 80)

(2) Although allegations were actually directed against the Minister, she was not a party to the proceedings before the High Court or in the appeal herein. Those allegations which the appellants had made against the Minister were irrelevant to the consideration of the application before the High Court and the instant appeal and would only be called into question and consideration, if at all, when there was an application for leave to commence judicial review against the Minister. (para 81)

(3) As the appellants herein were unable to prove the existence of any of the aforementioned exceptional circumstances against the Commissioner, the answer to the question of whether the appellants were at liberty to leapfrog and circumvent the alternative remedy created in s. 21(1) of the Act so as to apply direct to the High Court for leave to commence judicial review under O. 53 of the RHC, was in the negative. Hence, the High Court had rightly refused leave *in limine* at the first stage. (paras 62 & 82)

Per Suriyadi Halim Omar JCA (concurring):

(1) The all-paramount question in this case was whether or not the issue of domestic remedy must be canvassed and decided by the JC at this early stage *ie*, at the stage of the leave application. A judge must be apprised of all the facts first before discretion is to be applied. Nothing must be arbitrary. Here, the scenario was as follows: (i) the JC had no affidavit-in-reply to consider; (ii) there was an incomplete set of evidential and legal arguments regarding the factor of the domestic remedy; and (iii) there was evidence that the Minister could be biased. In such an instance, it was unreasonable to expect the JC to apply her discretion correctly as regards the issue of alternative remedy. In fact, as there was no affidavit-in-reply, the appellants should have won hands down in the circumstances of the case. Surely the purpose of leave would be defeated if such a substantive matter such as this must be resolved at such an early stage. The issue of alternative remedy went to the merit of the substantive application, with the court only to gauge whether the application before it was frivolous or not. (paras 100 & 101)

(2) The appellants in the course of the appeal had stated that the wording of s. 21 of the Act was such that it was open to another interpretation, in that the court was an alternative remedy to that of a decision by the Minister. That submission was legalistic and could not be brushed off offhandedly. It was not stated that the doors of the court were shut in the circumstances of the case, especially when the Minister, holding the same view as the respondent, had already directed the MTA to amend its constitution. Whether the appellants' interpretation was correct or otherwise was an issue that should only be resolved at the stage after leave had been granted and not before. It was substantial enough to deserve a full-blown hearing. (para 102)

Bahasa Malaysia *translation of headnotes*

Perayu-perayu, bertindak secara sendiri, serta bagi pihak Persatuan Taekwondo Malaysia ('MTA'), memohon kebenaran di bawah A. 53 k. 3(2) Kaedah-Kaedah Mahkamah Tinggi 1980 ('RHC') untuk mendapatkan perintah *certiorari* bagi mengenepikan satu "Surat Tunjuk Sebab" yang dikeluarkan oleh responden bertarikh 15 April 2005, dan bagi menghapuskan perintah responden

bertarikh 6 Mei 2005 membatalkan pendaftaran MTA. Perayu-perayu adalah Presiden, Naib Presiden, Setiausaha dan Bendahari MTA, satu-satunya persatuan taekwondo (dari tiga yang ada di negara ini) yang diiktiraf oleh Majlis Olimpik Malaysia bagi mewakili sukan taekwondo di negara ini. MTA mempunyai 17 ahli yang berhak mengundi yang mewakili 13 negeri, dua Wilayah Persekutuan dan seorang ahli bagi setiap dua organisasi berikut, iaitu Angkatan Tentera Malaysia dan Majlis Sukan Universiti-Universiti Malaysia. Selain dari ahli-ahli yang mempunyai hak mengundi perwakilan ini, terdapat satu lagi kategori ahli dikenali sebagai ahli sekutu – dari beberapa persatuan taekwondo seluruh negara – yang tidak mempunyai hak mengundi perwakilan. Menurut perayu-perayu, atas ketiadaan hak mengundi tersebut, ahli-ahli sekutu tersebut telah memberi tekanan kepada responden untuk mengubah perlembagaan MTA bagi membolehkan mereka mengundi.

Apabila ahli-ahli MTA menentang, responden, pada 15 April 2005, mengeluarkan suatu surat tunjuk sebab kepada MTA menuntut penjelasan mengapa MTA tidak boleh dibatalkan pendaftarannya di bawah s. 20(1)(e) Akta Pembangunan Sukan 1997 ('Akta'). Responden tidak menerima penjelasan yang diberikan oleh MTA berhubung surat tunjut sebab berkenaan, dan berikutnya, pada 6 Mei 2005, mengeluarkan perintah membatalkan pendaftaran MTA. Perayu-perayu boleh merayu kepada Menteri Sukan ('Menteri') terhadap keputusan responden, namun memilih untuk memfail permohonan di sini di Mahkamah Tinggi untuk semakan kehakiman, sambil berhujah bahawa: (i) rayuan kepada Menteri bukanlah mandatori kerana s. 21(1) Akta memberi pilihan kepada perayu-perayu sama ada untuk merayu kepada Menteri atau menggunakan remedi alternatif bagi mencabar keputusan responden; dan (ii) adalah sia-sia untuk merayu kepada Menteri kerana Menteri mempunyai prasangka dan prejudis terhadap pendirian semasa yang diambil oleh MTA. Mahkamah Tinggi menolak permohonan terutama atas alasan bahawa perayu-perayu mempunyai remedi alternatif di bawah s. 21(1)(c) Akta untuk merayu kepada Menteri, dan bahawa adalah pra-masa untuk merumuskan bahawa Menteri akan berprasangka dan prejudis sedangkan beliau masih belum mendengar rayuan. Perayu-perayu merayu terhadap keputusan Mahkamah Tinggi. Sebelum mempertimbang isu-isu substantif di rayuan ini, mahkamah terlebih dahulu perlu menangani satu persoalan awal yang dibangkitkan oleh responden, iaitu bahawa perayu-perayu tidak mempunyai *locus*

standi untuk membuat permohonan ini oleh kerana mereka bukanlah orang yang diberi autoriti untuk mendakwa untuk dan bagi pihak MTA.

Diputuskan (membenarkan rayuan)
Oleh James Foong HMR menyampaikan penghakiman majoriti mahkamah:

(1) Sebuah persatuan tidak boleh mendakwa atas namanya sendiri. Sebaiknya, tindakan harus dimulakan oleh pegawai-pegawai awam berdaftarnya. Jika tiada seorang pun yang didaftarkan sedemikian, maka ahli jawatankuasanya bolehlah memfailkan untuk dan bagi pihak ahli-ahlinya. Ini menjadikannya sebagai seorang wakil bagi semua orang yang mempunyai kepentingan yang sama di dalam prosiding, dan ini dibenarkan di bawah A. 15 k. 12(1) RHC. Inilah yang dibuat oleh perayu-perayu dalam kes semasa. Mereka adalah ahli-ahli jawatankuasa MTA dan mereka mendakwa atas nama mereka sendiri sebagai ahli jawatankuasa MTA. Ini bermakna mereka mewakili ahli-ahli MTA disebabkan mereka telah dilantik ke jawatan mereka tersebut. Walaupun hanya enam dari sepuluh orang sahaja dari jawatankuasa yang membuat tuntutan di sini, itu tidak menjadi hal kerana seorang ahli pun masih boleh mewakili ahli-ahli yang lain. Selain itu, di bawah A. 53 k. 2(4) RHC, tidak ada halangan terhadap kapasiti orang yang membuat permohonan untuk semakan kehakiman kecuali bahawa beliau hendaklah terjejas oleh keputusan pihak berkuasa awam yang membuat keputusan yang sedang disemak. Perayu-perayu, sebagai ahli-ahli MTA, semestinya adalah orang-orang yang terjejas oleh keputusan responden; oleh itu mereka harus dibenarkan untuk mendapat relif dari mahkamah.

(2) Menundakan begitu sahaja isu remedi alternatif ke satu peringkat kemudian untuk dipertimbangkan setelah kebenaran diberi bererti bahawa, walaupun bagi kes-kes yang gagal *in limine* atas isu kewujudan remedi alternatif, ia secara automatik tetap akan dibenarkan di peringkat permohonan kebenaran. Terdapat pengecualian yang terhad terhadap kaedah am bahawa semakan kehakiman tidak boleh diperolehi di mana wujud remedi alternatif melalui cara rayuan, dan tidak memperdulikan ini di peringkat permohonan kebenaran serta membenarkan semua kes-kes sedemikian diteruskan ke peringkat kedua selepas kebenaran diberi akan hanya melanggar

prinsip-prinsip mantap, terutama prinsip di dalam *Mohamed Nordin Johan v. Attorney General, Malaysia*, yang merupakan satu kes Mahkamah Persekutuan, dan keputusan Mahkamah Agong di dalam *J. P. Berthelsen v. Director-General of Immigration, Malaysia & Ors* yang berulang kali menyatakan bahawa ujiannya adalah sama ada permohonan untuk kebenaran adalah remeh bagi membolehkan kebenaran ditolak *in limine*. Jika isu remedi alternatif dibangkitkan di peringkat permohonan kebenaran, ia masih perlu dipertimbang dalam konteks ujian mantap ini dan tidak meninggalkannya untuk dinilai sepenuhnya di peringkat pendengaran substantif usul *certiorari* setelah kebenaran diberi.

(3) Dalam halkeadaan kes ini, tidak terdapat ketandusan bidangkuasa ataupun kegagalan melaksanakan mana-mana tanggungjawab statutori secara terang-terangan di pihak responden. Bagaimanapun, melihat kepada dakwaan perayu-perayu, terutama bahawa Menteri mempunyai prasangka, berprejudis dan telah membuat keputusan dahulu mengenai halperkara rayuan yang akan dibawa ke hadapannya di bawah s. 21(1)(c) Akta, akan berlaku pelanggaran terhadap prinsip-prinsip keadilan asasi jika Menteri bersikap seperti yang didakwa. Seseorang tidak dapat membayangkan bahawa seorang pengadil akan bersikap adil dan tidak berat sebelah jika dia telah mengambil bahagian dalam pertikaian di antara pihak-pihak dan telah mempengaruhi keputusan yang menjadi halperkara yang didengar di hadapannya. Ini tentunya bertentangan dengan kehendak bahawa seorang pengadil mesti berlaku saksama dan tidak berat sebelah. Memanglah alegasi-alegasi terhadap Menteri ini tidak dibuktikan, tetapi di peringkat prosiding ini mahkamah tidak dipanggil untuk menyelidik dengan secara mendalam bagi mendapatkan kebenaran. Itu akan dibuat di peringkat yang seterusnya, setelah kebenaran diberi dan halperkara boleh disiasat sepenuhnya. Di peringkat ini, apa yang perlu hanyalah bagi mahkamah untuk menimbang, berdasarkan kepada apa yang didedahkan oleh pihak-pihak, sama ada terdapat satu kes yang boleh dihujah yang berpihak kepada membenarkan perintah *certiorari*.

(4) Meneliti alasan-alasan penghakiman yang arif Pesuruhjaya Kehakiman ('JC'), jelas bahawa beliau telah khilaf pada dua aspek. Pertama adalah kegagalannya untuk menyedari bahawa permohonan di hadapan beliau hanya memerlukan penilaian

terhadap dakwaan-dakwaan yang dibuat oleh perayu-perayu berhubung sama ada siasatan lanjut diperlukan bagi menentukan sama ada untuk memberi atau tidak satu perintah *certiorari*. Kedua, atas dakwaan-dakwaan yang dibuat oleh perayu-perayu, beliau gagal menimbang bahawa pelanggaran keadilan asasi mungkin berlaku jika Menteri mendengar rayuan yang dibawa oleh perayu-perayu di bawah s. 21(1)(c) Akta. Ini dengan sendirinya menjadi pengecualian kepada kaedah am bahawa semakan kehakiman bukanlah satu pilihan di mana terdapat remedi alternatif melalui rayuan. Permohonan perayu-perayu, dengan itu, bukanlah remeh dan menyusahkan bagi menjustifikasikan keengganan memberi kebenaran *in limine*.

Oleh Low Hop Bing HMR (menentang):

(1) Mengambilkira keputusan Mahkamah Persekutuan di dalam *Pengurusan Danaharta Nasional v. Tang Kwor Ham & Ors and Another Appeal*, Mahkamah Tinggi bebas dan malah bertanggungan untuk mempertimbang sebarang perkara yang dibangkitkan, termasuk soal remedi alternatif, di peringkat pertama permohonan pendengaran di bawah A. 53 k. 3(1) RHC. Pertimbangan sama ada kebenaran harus diberi atau ditolak *in limine* mengangkuti pelaksanaan budi bicara berdasarkan prinsip-prinsip kehakiman mantap, dengan mengambilkira segala fakta dan halkeadaan sesuatu kes. Dalam hubungan ini, harus diperhatikan bahawa di mana terdapat peruntukan untuk rayuan kepada perayu-perayu di sini, *certiorari* biasanya tidak diberi kecuali perayu-perayu boleh membuktikan keadaan-keadaan mengecualikan berikut: (a) terdapat ketandusan bidangkuasa di pihak Pesuruhjaya Sukan berhubung keputusan yang dicabar, iaitu perintah pembatalan; (b) terdapat kegagalan secara terang-terangan di pihak Pesuruhjaya Sukan dalam melaksanakan beberapa tanggungjawab statutori; (c) Pesuruhjaya Sukan telah melakukan pelanggaran serius prinsip-prinsip keadilan asasi; atau (d) ketaksahan. Atas penelitian sewajarnya fakta-faka kes ini, perayu-perayu gagal membuktikan mana-mana satu dari pengecualian di atas terhadap Pesuruhjaya Sukan. Lebih penting, Pesuruhjaya Sukan, dengan memberikan surat tunjuk sebab kepada perayu-perayu, telah memberikan mereka peluang untuk didengar. Itu jelas mematuhi kehendak penting kaedah-kaedah keadilan asasi. Di pihak Pesuruhjaya Sukan, tidak terdapat sebarang pelanggaran, apatah lagi pelanggaran serius, terhadap prinsip-prinsip penting keadilan asasi.

(2) Walaupun alegasi diarahkan kepada Menteri, beliau bukanlah pihak kepada prosiding di Mahkamah Tinggi mahupun rayuan di sini. Dakwaan-dakwaan yang dibuat oleh perayu-perayu terhadap Menteri tersebut adalah tidak relevan kepada pertimbangan permohonan di hadapan Mahkamah Tinggi dan rayuan semasa dan hanya akan menjadi persoalan dan dipertimbangkan, jika perlu, bilamana terdapat permohonan kebenaran untuk memulakan semakan kehakiman terhadap Menteri.

(3) Oleh kerana perayu-perayu di sini gagal membuktikan kewujudan mana-mana halkeadaan mengecualikan di atas terhadap Pesuruhjaya Sukan, maka jawapan kepada soalan sama ada perayu-perayu bebas untuk melangkahi atau mengelak remedi alternatif yang dicipta oleh s. 21(1) Akta sekaligus untuk memohon terus ke Mahkamah Tinggi untuk kebenaran untuk memulakan semakan kehakiman di bawah A. 53 RHC, adalah berbentuk negatif. Mahkamah Tinggi, dengan itu, telah dengan betulnya menolak permohonan kebenaran *in limine* di peringkat pertama.

Oleh Suriyadi Halim Omar HMR (menyetujui):

(1) Persoalan terpenting di dalam kes ini adalah sama ada atau tidak isu remedi domestik perlu ditangani dan diputuskan oleh JC di peringkat awal ini, iaitu di peringkat permohonan kebenaran. Seorang hakim harus mendapat manfaat semua fakta sebelum melaksanakan budi bicaranya. Tiada suatu pun harus diputuskan secara arbitrari. Di sini, keadaannya adalah seperti berikut: (i) JC tidak mempunyai afidavit jawapan untuk dipertimbangkan; (ii) hujah undang-undang dan keterangan mengenai faktor remedi domestik yang ada di hadapan JC adalah tidak lengkap; dan (iii) terdapat keterangan bahawa Menteri mungkin berat sebelah. Dalam keadaan sedemikian, adalah tidak munabasah untuk mengharapkan JC melaksanakan budi bicaranya dengan betul berhubung isu remedi alternatif. Malah, oleh kerana afidavit jawapan tidak wujud, perayu-perayu sepatutnya menang tanpa perlu berlawan dalam halkeadaan yang wujud. Tentunya tujuan memberi kebenaran akan terabai jika perkara yang sepenting ini perlu diputuskan di peringkat yang seawal itu. Isu remedi alternatif melibatkan merit permohonan substantif, dengan mahkamah hanya perlu meneliti sama ada permohonan di hadapannya remeh ataupun tidak.

(2) Perayu-perayu semasa perjalanan rayuan telah menyatakan bahawa perbahasaan s. 21 Akta adalah sebegitu rupa sehingga menyebabkan ia terbuka kepada satu pentafsiran lain, iaitu bahawa mahkamah merupakan remedi alternatif kepada keputusan yang dibuat oleh Menteri. Hujah ini bersifat legalistik dan tidak boleh diketepikan begitu sahaja. Tidak dinyatakan bahawa pintu mahkamah telah ditutup dalam halkeadaan kes, terutama bilamana Menteri, yang mempunyai pandangan yang sama seperti responden, sudah pun mengarahkan MTA untuk meminda perlembagaannya. Sama ada pentafsiran perayu-perayu betul ataupun tidak adalah satu isu yang harus diselesaikan di peringkat selepas kebenaran diberi dan tidak sebelumnya. Ia cukup substantif untuk didengar di satu pendengaran penuh.

Case(s) referred to:

Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 1 CLJ 701 FC ***(refd)***

JP Berthelsen v. Director General Of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(refd)***

George John v. Goh Eng Wah Bros Film Sdn Bhd & Ors [1988] 1 MLJ 319 ***(refd)***

Government Of Malaysia & Anor v. Jagdis Singh [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC ***(refd)***

IRC v. National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617 ***(refd)***

Karting Club of Singapore v. David Mak & Ors [1985] 2 MLJ 280 ***(refd)***

Khoo Ah Imm & Ors v. Datuk Bandar Kuala Lumpur & Anor [1997] 3 CLJ 519 CA ***(refd)***

Lai Cheng Cheong v. Sowaratnam [1983] 1 CLJ 282; [1983] CLJ (Rep) 216 FC ***(refd)***

Lim Cho Hock v. Speaker Perak Legislative Assembly [1979] 2 MLJ 85 ***(refd)***

Mohamed Nordin Johan v. Attorney General Malaysia [1983] 1 CLJ 130; [1983] CLJ 271 (Rep) SC ***(refd)***

Mohd Latiff Shah Mohd v. Tengku Abdullah ibni Sultan Abu Bakar [1995] 3 CLJ 77 HC ***(refd)***

Naga Jaguh Development Sdn Bhd v. Danaharta Urus Sdn Bhd [2005] 3 CLJ 818 HC ***(refd)***

Ong Boon Seong v. Syed Hussein Alatas [1971] 2 MLJ 218 ***(refd)***

Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal [2007] 4 CLJ 513 HC ***(refd)***

QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***

R v. Postmaster General Exp Car Michael [1928] 1 KB 291 ***(refd)***

S Kulasingam & Anor v. Commissioner of Lands, Federal Territory& Ors [1982] CLJ 65; [1982] CLJ (Rep) 314 FC ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2004] 6 CLJ 398 HC ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA ***(refd)***
Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Sdn Bhd & Ors [2003] 7 CLJ 205 HC ***(refd)***
Tenaga Nasional Bhd v. Tekali Prospecting Sdn Bhd [2002] 3 CLJ 624 CA
The King v. Wandsworth Justices [1942] 1 KB 281 ***(refd)***
Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***
YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor [2003] 1 CLJ 210 ***(refd)***

Legislation referred to:
Pengurusan Danaharta Nasional Berhad Act 1998, s. 72
Rules of the High Court 1980, O. 15 r. 12(1), O. 53 rr. 1, 2(2), (4), 3(1), (2), 4(1), (2), (5)
Societies Act 1966, s. 9(c)
Sports Development Act 1997, ss. 18, 20(1)(e), 21(1)(c), (2)

Other source(s) referred to:
Malaysian High Court Practice 2003 Desk Edition, p 424, para 15.12.5

For the appellants - MS Murthi; M/s Murthi & Partners
For the respondent - Suzana Atan FC

[Appeal from High Court, Kuala Lumpur; Civil Suit No: R2-25-88-2005]

Reported by Suresh Nathan

JUDGMENT

James Foong JCA:

Introduction

[1] The appellants, on their own, and on behalf of the Malaysian Taekwondo Association (MTA), applied under O. 53 r. 3(2) of the Rules of the High Court 1980 (RHC) for:

1. leave to apply for an order of *certiorari* to:

   (a) remove a "Show Cause Order" dated 15 April 2005 issued by the respondent and,

(b) quash the order issued by the respondent on 6 May 2005 revoking the registration of MTA;

2. for an interim order staying all "proceedings under O. 53 r. 3(5) Rules of the High Court"; and

3. the costs of this application be costs in the cause.

[2] Though O. 53 r. 3(2) of the RHC requires this application to be made *ex partes*, I noticed, from the notes of proceedings, that it was instead heard *inter partes*, with Ms Mary Lim, Senior Federal Counsel, representing and arguing for and on behalf of the respondents.

Background

[3] The facts of this case are as follow: The appellants are the President, Vice Presidents, Secretary and Treasurers respectively of MTA. MTA is the only taekwondo association (out of three in this country) recognized by the Olympic Council of Malaysia (OCM) to represent the sport of taekwondo in this country. The constitution of MTA provides for voting right to only 17 of its members. They are: (a) a representative from each of the 13 state taekwondo associations; (b) a representative from each of the taekwondo associations from the Federal Territories of Kuala Lumpur and Labuan; (c) a representative each from the Malaysian Armed Forces and the Malaysian Universities Sports Council. According to the appellants, this reflects a fair representation of members across the country. Aside from these members who have representative voting rights, there is another category of membership known as associate members. They do not have representative voting rights. These members are from various taekwondo associations across the country with the highest number concentrating in Kuala Lumpur. Due to their lack of representative voting rights, they had, according to the appellants, applied pressure on the respondent to change its constitution to allow them to vote. When the members of MTA resisted, the respondent on 15 April 2005 issued a show cause letter to MTA demanding to know why MTA should not be de-registered under s. 20(1)(e) of the Sports Development Act 1997 (SD Act). This section reads:

A Revocation or suspension of registration by Commissioner

20. (1) The Commissioner may revoke or suspend the registration of a sports body if the Commissioner is satisfied that such sports body:

B (e) is hindering the development of the particular sport and it is in the public interest to revoke or suspend its registration.

[4] Then on 6 May 2005, when the respondent refused to accept the explanation provided by MTA in response to the show C cause letter, the respondent issued an order to de-register MTA.

[5] MTA could have appealed to the Minister of Sports against the decision of the respondent under s. 21(1)(c) of the SD Act which provides:

D Any sports body aggrieved by a decision of the Commissioner:

in revoking or suspending the registration of such sports body may, within thirty days from the date of the notification of the decision of the Commissioner, appeal to the Minister whose decision thereon shall be final.

E

[6] And under s. 21(2) SD Act:

Before making any decision under subsection (1), the Minister may refer the matter to the Sports Advisory Panel.

F **[7]** Instead of following this process, the appellant elected to file this application in the High Court for judicial review. The reasons proffered by them are:

1. The appeal to the Minister of Sports (the Minister) is not G mandatory. Section 21(1)(c) of the SD Act provides that "such sports body may" appeal (emphasis added). The word "may" connotes a choice as compared to the word "shall" which denotes a mandatory act. Thus the appellants have an option to either appeal to Minister or seek an alternative H remedy to challenge the decision of the respondent. The latter was preferred.

2. It is futile to appeal to the Minister under s. 21(1)(c) of the SD Act since the honourable Minister is biased and prejudiced against the current stand of MTA. Besides, she has also I prejudged this dispute as derived from her conduct and speeches reported in a national daily, particularly these:

On 13 January 2005 New Straits Times (NST)

Sports Minister Datuk Azalina Othman Said in a decision that could shift the balance of power in national sports associations, on Tuesday ordered the Malaysian Taekwondo Association (MTA) to amend their constitution to allow clubs direct affiliation and voting rights, just like state affiliates.

On 1 February 2005 NST

Granting clubs voting rights is what Azalina ordered but that as far as MTA was concerned, would appear easier said than done.

On 8 February 2005 NST

MTA were instructed by Sports Minister Datuk Azalina Othman Said to amend their constitution to give clubs voting rights and extra ordinary general council (EGC) meeting was held last Tuesday to do that.

On 14 April 2005, NST

GET your house in order!

That is the message to the Malaysian Taekwondo Association (MTA) from the Sports Minister Datuk Azalina Othman Said.

And if MTA continue to hamper the admission of clubs into their structure and remain defiant to the directives from her or the Sports Commissioner's Office, the association can forget about funding from the Ministry or the National Sports Council (NSC).

If MTA say they don't want clubs in their structure and they don't want to heed directives from the Minister or the Sports Commissioner's Office, don't come to us for funding," said Azalina after chairing her Ministry's post cabinet meeting in Bukit Jalil yesterday.

On 28 April 2005 NST

On April 13 this year, the Sports Minister Datuk Azalina Othman Said issued a stern reminder to put their house in order. And if the national body continue to hamper the admission of clubs into their structure or remain defiant to the directives from her, or the Sports Commissioner's Office, the association can forget about funding from the Ministry or the NSC.

On 4 May 2005 NST

> But Sports Minister Datuk Azalina Othman Said issued a directive to the MTA to give clubs direct affiliation and voting rights in January and Elyas followed up with a dialogue on Feb 16 and presented the association with 5 models of governance, all granting clubs voting rights.

[8] The appellants stressed that as none of the aforesaid press reports were ever retracted or clarified by the Minister, it must be implied that the Minister "was the mastermind directing the Commissioner of Sports to harass MTA to make the constitutional amendments on pain of refusal of funds to MTA".

[9] Further, the appellants contended that the Minister is resentful of MTA as she is a holder of a black belt in taekwondo from a rival association (International Taekwondo Federation (ITF)) which is not recognized as the governing taekwondo body in Malaysia. Though she has attempted to elevate the status of ITF by proposing a merger of MTA, ITF and one other local taekwondo association into a single national body this failed because the governing body of MTA prohibited such merger.

[10] Relying on these assertions, the appellants are of the view that "the Minister is disqualified to sit in judgment over the matter of appeal under s. 21 of the Sports Development Act 1997 and MTA has decided to come to the court directly".

Ruling Of The High Court

[11] When this application came before the High Court, it was dismissed principally on the ground that the appellants have an alternative remedy under s. 21(1)(c) of the SD Act to appeal to the Minister. The learned Judicial Commissioner who heard the case stressed that it is premature to judge the Minister for being biased, prejudiced and had prejudged the issue when she has not even heard the appeal.

A Preliminary Issue: Whether The Appellants Have The Right To Make This Application

[12] Before I deal with the substantive issue, there is one preliminary matter raised by the respondent that needs to be dealt with. This concerns O. 53 r. 2(4) of the RHC which says:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[13] According to the Federal Counsel, the appellants have no *locus standi* to make this application. She contended that the applicants are not authorized persons to sue for and on behalf of MTA. Further, the appellants constituted only six of ten committee members of MTA. The views and positions of the other four are unknown. Thus, it is unsafe and improper to accept the appellants as proper parties in this action.

[14] I noticed that this issue was raised in the High Court but unfortunately no express ruling was made by the learned Judicial Commissioner on it. Instead, the learned Judicial Commissioner proceeded straight into the substantive issues. I am of the view that by such action it must be implied that the learned Judicial Commissioner must have dismissed this preliminary objection otherwise, if she would have dismissed this action on this ground from the very beginning.

[15] It is my view that MTA being an association falls within the governing provisions of the Societies Act 1966 (Societies Act). Section 9(c) of the Societies Act provides:

> ... a society may sue or be sued in the name of such one of its members as shall be declared to the Registrar and registered by him as the public officer of the society for that purpose, and, if no such person is registered, it shall be competent for any person having a claim or demand against the society to sue the society in the name of any office-bearer of the society; ...

[16] Since there is no evidence before us to indicate that any of appellants are registered as the public officer of MTA with the Registrar of Societies, I must take it that none of them are statutorily appointed to take on the responsibility of suing and being sued for and on behalf of MTA. In such a situation, can the appellants, in their official capacities as committee members of MTA institute this proceeding for themselves and on behalf of MTA against the respondent?

[17] To influence us that this cannot be done, Federal Counsel cited the Singapore case of *Karting Club of Singapore v. David Mak & Ors* [1985] 2 MLJ 280 @ 283 where Chua J declared:

> An unincorporated member club, not being a partnership or legal entity, cannot sue or be sued in the club name (see *London Association for Protection of Trade v. Greenlands, Ltd* [1916] 2 AC 15. The *Karting Club of Singapore* is unincorporated and consequently cannot be made a plaintiff to this action.

[18] Though I agree that this is the correct position of the law but MTA, as a body, did not institute this action. The appellants did so themselves and on behalf of MTA. Could this be done? I believed that this is permitted as can be seen from the following authorities:

[19] In *Ong Boon Seong v. Syed Hussein Alatas* [1971] 2 MLJ 218 at p. 221 Abdul Hamid J (as he then was) said:

> It is argued that the plaintiff has no right to start this action for and on behalf of the society as he is not a registered public officer. Mr Ng Ek Teong counsel for the plaintiff submitted that the plaintiff is suing in his own name and he has properly instituted this legal action on the grounds, first, as a member, he instituted this legal action in the capacity of his individual right as a member. Secondly, he sues in his own right as a person who has been appointed secretary-general; and thirdly, he sues in the representative capacity authorized by the central committee. To my mind, it cannot be denied that as a member of the party, the plaintiff has the right to sue. Whilst it may be true that he sued in his own name, the fact remains that at all material times, he was holding the office of deputy secretary-general and a member of the central committee. In my opinion, the plaintiff is competent to institute these proceedings.

[20] This approach was adopted in *Mohd Latiff bin Shah Mohd v. Tengku Abdullah ibni Sultan Abu Bakar* [1995] 3 CLJ 77 when Zakaria Yatim J overruled the objection on legal capacity of the plaintiffs who were suing on behalf of themselves and all members of the club.

[21] Then in *S. Kulasingam & Anor. v. Commissioner of Lands, Federal Territory & Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314 the Federal Court when dealing with an almost identical situation suggested (at p. 210):

> First, the Association as such has no standing and is incompetent to sue as a plaintiff. It is a body registered under the Societies Act and section 9(c) thereof specifically provides that a society may sue in the name of its registered public officer. If there is no member registered as such, but we have not been told that that is so, then we would think that if it was at all necessary for the Association to sue jointly as a plaintiff a representative claim by one or more of its office bearers on behalf of all the members would be a solution.

[22] From these authorities, it is clear that the approach should be these: Firstly, for certain, an association cannot sue in its own name. Preferably an action should be commenced by its registered public officer. If none is registered as such, then it is permissible for any officer bearer of the association to mount a claim for and on behalf of its members. This would put him on the same footing as a representative for others having the same interest in the proceeding which is permitted under O. 15 r. 12(1) of the RHC.

[23] In our instant case, the appellants did exactly that. They are office bearers of the MTA and they sued in their own names as committee members of MTA. This means that they are representing the members of MTA by virtue of them being elected by the latter to such position. Though only six out of ten committee members brought this action, this is immaterial since even a single member can represent other members. Further, under O. 53 r. 2(4) of the RHC there is no restriction on the capacity of the person making an application for judicial review except that he must be adversely affected by the decision of the public authority who made the decision under review. The appellants being members of MTA are certainly persons who are adversely affected by the decision of the respondent and as such they should be allowed to seek relief from the court.

Legal Principles

[24] There is no dearth of legal authorities disclosing the test to be applied for an application for leave of *certiorari*. A comprehensive summary of this is set out by Gopal Sri Ram JCA in *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927. I do not intend to repeat all the authorities cited except to identify some which are pertinent and relevant in the course of my analysis to ascertain whether the court below had asked the right questions and taken into consideration relevant matters into account.

[25] The starting point is to be reminded that there are two stages in an application under O. 53 of the RHC. The first is the leave stage. And only after leave is granted under O. 53 r. 3(1) of the RHC can an applicant proceed to apply for an order of *certiorari* under O. 53 rule 2 of the RHC.

[26] At leave stage, which is the status of the appellants' application, Lord Diplock in *IRC v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 @ 643 said:

A The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion to give him leave to apply for that relief.

[27] This principle was elaborated locally by Lim Beng Choon J in *George John v. Goh Eng Wah Bros. Filem Sdn Bhd & 2 Ors* C [1988] 1 MLJ 319:

At the outset, it is very significant to take note that the application in the instant proceeding is not one for an order of *certiorari* but rather for leave to apply for such an order. On principle and authority, I am of the view that at this stage of the proceeding, D the court is required only to inquire whether the matter to be decided by the court is not in fact frivolous and vexatious in the sense that it is a trivial complaint of an administrative error by a busybody with a misguided sentiment and misconception of the law. Another requirement at this stage of the proceeding which a E court has to consider is that the applicant must produce sufficient evidence to sustain a *prima facie* case that a public officer or authority that made the decision had acted unlawfully or that he or it had in its exercise of the administrative discretion acted *ultra vires* the power given to him or it under the relevant statute. If the court is satisfied that the applicant has complied with these F two requirements, leave would usually be granted irrespective of whether the applicant has suffered no greater injury than thousands of the King's subjects.

[28] And for a concise description of this principle, Raja Azlan G Shah Ag LP (as his Royal Highness then was) in *Mohamed Nordin bin Johan v. Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 declared:

We allowed the appeal and granted the appellant leave to apply for an order of *certiorari* because we are of the view that the H learned judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave *in limine* and justified argument on a substantive motion for *certiorari*. When this Court grants leave, it has jurisdiction to hear the substantive motion itself.

I

Is The Appellants' Case Frivolous And Vexatious To Merit The Refusal Of Leave *In Limine*?

[29] So the question to be asked in our instant case is whether the appellants' application is frivolous and vexatious to justify refusal of leave *in limine*. The learned Judicial Commissioner answered this in the affirmative based primarily on the fact that there exist an alternative domestic remedy for the appellant to appeal against the decision of the respondent under s. 21(1)(c) of the SD Act. But does the availability of this remedy alone justify the refusal of leave to apply for an order of *certiorari*?

[30] I am aware that this court in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532, has gone as far as to declare:

> In the light of these weighty authorities, it is manifestly clear that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. A *fortiori*, it is a matter which does not fall to be considered on a leave application.

[31] But I am not inclined to accept such a wide proposition in the light of the authorities disclosed. This is too broad an interpretation given to the cases cited. To summarily assign this issue of an alternative remedy to a subsequent stage for consideration after leave has been granted would, in my view, mean that even cases which are bound to fail *in limine* on the issue of availability of an alternative remedy would automatically be permitted at leave stage. It must be reminded that there are only limited exceptions to the general rule that judicial review is not available where there is an alternative remedy by way of appeal. And to ignore this at leave stage and allow all cases of such nature to proceed to the second stage after leave is granted would go beyond established principles particularly that of *Mohamed Nordin bin Johan v. Attorney General, Malaysia (supra)* which is a Federal Court case and the Supreme Court decision in *J.P. Berthelsen v. Director-General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 which repeatedly states that the test is whether the application for leave is frivolous to merit the refusal of leave *in limine.* In my view, if the issue of an alternative remedy is raised at leave stage, it must still be considered in the light of this established test rather than leaving it completely for evaluation at the substantive hearing of the motion of *certiorari* after leave has been granted.

[32] In general, judicial review is not available where there is an alternative remedy by way of appeal. But there are exceptions to this general rule. Hashim Yeop A. Sani SCJ (as he then was) in the Supreme Court case of *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110, declared:

> In answer to the first question we would therefore hold that the discretion is still with the courts but where there is an appeal provision available to the applicant *certiorari* should not normally issue unless there is shown a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice.

[33] This ruling was made after the Supreme Court had observed:

> The learned judge referred to a number of English cases mostly on natural justice and conclude correctly that it was not an invariable rule that if an appeal lies to a higher tribunal the court will refuse the remedy of judicial review. Then he proceeded to ask the questions what are the circumstances where remedy would be available in spite of appeal procedures provided by Parliament. He said that since natural justice plays a prominent role in administrative law he was of the view that a breach of natural justice does fall within the exceptions. We can hardly quarrel with this general proposition. However, it can hardly be missed that in recent years the law on judicial review has made tremendous progress and the courts are now more flexible in the use of the prerogative powers to check excess or abuse of powers.

[34] So in the circumstances of this case is there "a clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice" to preclude an avenue for judicial review when alternative remedy by way of appeal is available? On the ground of a lack of jurisdiction I do not think so. And neither do I think there was a blatant failure to perform some statutory duty on the part of respondent. But judging from the appellants' allegations alluded to by the appellants, particularly that the Minister is biased, prejudiced and has prejudged the subject matter of the appeal that may be brought before her under s. 21(1)(c) SD Act, then if she is there would be a breach of the principles of natural justice. One cannot envisage a person sitting in judgment to be fair and unbiased if he or she had fully participated in the dispute between the parties and had influenced the decision which is the subject matter of the hearing before him. This certainly opposes the

requirement that the arbiter must be fair and impartial. Indeed, I have reminded myself of what the learned Judicial Commissioner has said in her judgment, that these allegations against the Minister are not proven. But at this stage of the proceeding the court is not concerned with an in-depth search for the truth. This should be undertaken at the next level, after leave is granted, when the matter can be fully investigated. At this stage, all that is necessary is for the court to consider, based on what is disclosed by the appellants, whether there is an arguable case in favour of granting an order of *certiorari*. For authority, the first is the Supreme Court case of *Tuan Hj Sarip Hamid & Anor v. Patco Malaysia Bhd.* [1995] 3 CLJ 627 where Edgar Joseph Jr. SCJ said:

> *R v. Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107, the Court of Appeal in England correctly laid down guidelines to be followed by the court when considering an application for leave, in the following terms:
>
> (i) The judge should grant leave if it is clear that there is a point for further investigation on a full *inter partes* basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.
>
> (ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
>
> (iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that *inter partes* leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator award, ... namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

[35] The second is the High Court decision of *YAM Tunku Dato' Seri Nadzaruddin Ibni Tuanku Ja'afar v. Datuk Bandar Kuala Lumpur & Anor* [2003] 1 CLJ 210 where Ramly Ali J said:

> At this stage of the proceedings, the court need not go into the matter in great depth. The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at that stage. If on a guide perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called upon to exercise when all the evidence is in and the matter has been fully argued at the hearing of the substantive application (see *Inland Revenue Commissioners v. National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617).

[36] Having perused the grounds of judgment of the learned Judicial Commissioner, I am of the view that she has erred in two aspects. The first is her failure to recognize the application before her only requires an evaluation of the allegations of the appellants as to whether further investigation is required in deciding whether to grant or refuse an order of *certiorari.* Second, on the allegations as presented by the appellants, she has failed to appreciate that there could be a breach of natural justice if the Minister is to hear the appeal brought by the appellants under s. 21(1)(c) of the SD Act. This by itself would constitute an exception to the general rule that judicial review is not an option when there is an alternative remedy available by way of appeal. The appellants' application is therefore not frivolous and vexatious to justify refusal of leave *in limine.*

Another Proceeding Instituted By The Appellants

[37] Before I conclude, there is one other issue raised by the Federal Counsel and this concerns the appellant having instituted another separate set of proceeding before the High Court at Kuala Lumpur bearing case no. GS R2 -22-04-2005. According to the Federal Counsel, the appellants have abused the court process and should be barred from succeeding in this appeal.

[38] On this, all that I need to say is firstly, there is no record before us as to the nature of this other case allegedly filed by the appellants. Secondly, as this issue requires further investigation on an *inter partes* basis then it should only be raised and considered

at the hearing of the substantive application of whether to grant or refuse an order of *certiorari* after leave has been granted, and not at this preliminary stage. The raising of this issue is premature.

Conclusion

[39] For reasons aforesaid, I have allowed this appeal with costs to the appellants. Deposit for this appeal to be refunded to the appellants.

Low Hop Bing JCA (dissenting):

Appeal

[40] This is an appeal brought by the appellants- applicants ("the applicants") against the decision of the learned judge of the Kuala Lumpur High Court made on 9 August 2005, dismissing the applicants' application for leave to commence judicial review by way of *certiorari* under O. 53 r. 3(2) of the Rules of the High Court 1980.

Factual Background

[41] The applicants are suing on their own behalves and on behalf of the Malaysia Taekwondo Association ("the Association").

[42] The respondent is the Commissioner of Sports ("the Sports Commissioner").

[43] The Association was until 6 May 2005 a registered sports body pursuant to s. 18 of the Sports Development Act 1997 ("the Act") but on 6 May 2005 became an unregistered and unincorporated sports body with no legal personality.

[44] A reference to a section hereinafter is a reference to that section in the Act unless otherwise stated.

[45] Originally, the applicants sought leave to issue *certiorari* to remove the Sports Commissioner's show cause letter dated 15 April 2005 ("the show cause letter") as well as the order of revocation dated 6 May 2005 made by the Sports Commissioner under s. 20 ("the revocation order"). However, the applicants have now confined themselves to the application for leave in relation to the revocation order only.

[46] The Association was formed in 1974 and is affiliated to the World Taekwondo Federation ("WTF") and the Olympic Council of Malaysia.

[47] The Association is the only sports body recognized by the WTF to run the WTF style of Taekwondo, which is a recognized Olympic sport.

[48] The Association has 17 full voting members representating 13 states, two Federal Territories, and one member each for two organizations *viz* the Malaysian Armed Forces and the Malaysian Universities Sports Council. There are therefore only 17 votes to represent about 300,000 practitioners of Taekwondo in Malaysia.

[49] The constitution of the Association provides for the admission of associated members who are individuals and who do not represent any state or district.

[50] On 13 April 2005, the Sports Commissioner received and considered the proposed amendments to the constitution of the Association including articles 5.8 and 6.4 specifically (collectively "the proposed amendments") passed at the biennial general conference on 27 March 2005, and was satisfied that there are reasons for him to take action to revoke the Association under s. 20(1)(e).

[51] *Vide* the show cause letter, the Sports Commissioner gave the applicants an opportunity within 14 days from the date thereof ie on or before 29 April 2005 to submit reasons, if any, against the proposed revocation.

[52] In response thereto, the Association *vide* letter dated 16 April 2005 informed the Sports Commissioner that the proposed amendments were only for the purposes of development of the sport and its management, and not otherwise, and would like to know how the proposed amendments could be hindering the development of the sport.

[53] *Vide* letter dated 6 May 2005, the Sports Commissioner informed the Association that the Sports Commissioner had considered and was not satisfied with the explanation contained in the Association's said letter. The Sports Commissioner had *vide* Form 5 decided to revoke the registration of the Association with effect from 16 May 2005 on the ground that the Association is

hindering the development of the particular sport of taekwondo and that it is in the public interest to revoke its registration pursuant to s. 20(1)(e).

[54] The applicants alleged that the Minister has made various "uncontradicted, unretracted and unchallenged press statements" in the New Straits Times from 13 January 2005 to 4 May 2005, showing the Minister's prejudice and prejudgment.

[55] On 12 May 2005, the applicants applied to the Kuala Lumpur High Court for leave to issue *certiorari.* The learned judge had on 9 August 2005 refused leave. Hence the instant appeal before this court.

Two Stages Under O. 53

[56] It is to be noted that the judicial review procedure under O. 53 provides for two stages.

[57] The first stage, available under O. 53 r. 3(1), necessitates the obtaining of leave, as no application for judicial review under O. 53 shall be made unless leave therefor has been granted in accordance therewith. This concerns the preliminary application under O. 53 r. 2(2) for leave to commence judicial review proceedings. Leave may be granted or refused *in limine* as the case may be. Illustrations of cases which concern the first stage in which leave has been refused *in limine* include:

(1) *QSR Brands Bhd v. Suruhanjaya Securiti & Anor* [2006] 2 CLJ 532 CA in which the High Court's leave refusal *in limine* was affirmed by the Court of Appeal;

(2) *Tang Kwor Ham v. Pengurusan Danaharta Nasional Bhd* [2006] 1 CLJ 927 CA in which the Court of Appeal reversed the High Court's leave refusal *in limine* in *Tang Kwor Ham & Ors V. Pengurusan Danaharta Nasional Sdn. Bhd & Ors* [2003] 7 CLJ 205 HC; and instead granted leave on appeal, but the Federal Court had on 6 July 2007 in *Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal* [2007] 4 CLJ 513 affirmed the High Court's leave refusal *in limine*, thereby overruling the Court of Appeal; and

(3) *Ta Wu Realty Sdn. Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2004] 6 CLJ 398 HC, where leave was refused *in limine* by the High Court.

[58] The second stage is regulated by O. 53 r. 4(1) and (2). That concerns the substantive application for *certiorari* after leave has been granted. Authorities which revolve around the second stage include:

(1) *Government Of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 SC;

(2) *Khoo Ah Imm @ Chang Bee Kiam & Ors v. Datuk Bandar Kuala Lumpur & Anor* [1997] 3 CLJ 519 CA; and

(3) *Tenaga Nasional Bhd v. Tekali Prospecting Sdn. Bhd* [2002] 3 CLJ 624 CA.

[59] As the instant appeal arose from the High Court's leave refusal *in limine* at the first stage, I am of the view that only the authorities which expound on the ramifications of the first stage are directly relevant and merits consideration here. However, on the other hand, the authorities which deal with the second stage, after leave has been granted, are unlikely to be of any assistance in the determination of the instant appeal.

Failure To Exhaust Alternative Remedy

[60] It was submitted by applicants' learned counsel Dato MS Murthi that this appeal is focused on one single point of law ie whether the High Court was right in refusing leave on the ground that the applicants have not exhausted the alternative remedy by way of an appeal to the Minister of Sports ("the Minister"). He added that the word "may" in s. 21 is permissive, and not compulsive and not mandatory, as opposed to the word "shall". He relied on the Court of Appeal judgment in *QSR Brands Bhd, supra.*

[61] Learned senior federal counsel Ms Suzana Atan contended that the applicants being aggrieved by the revocation order made by the Sports Commissioner should first appeal under s. 21(1) to the Minister within 30 days of the notification of the Sports Commissioner's decision. The High Court agreed. The contention presented for the Sports Commissioner was sustained.

[62] Given that backdrop, the question which calls for determination in the instant appeal is whether the appellants are at liberty to leapfrog and circumvent the alternative remedy created in s. 21(1), so as to apply direct to the High Court for leave to commence judicial review under O. 53 ("the question").

[63] In my judgment, the relevant provisions of the Act which merit consideration are ss. 20(1)(e), 21(1) and 21(2). A

[64] Section 20(1)(e), where relevant, provides as follows:

> Revocation … of registration by Commissioner. B
>
> 20(1). The Commissioner may revoke … the registration of a sports body if the Commissioner is satisfied that such sports body -
>
> *(a)* … C
>
> *(b)* …
>
> *(c)* …
>
> *(d)* … D
>
> *(e)* is hindering the development of the particular sport and it is in the public interest to revoke … its registration;
>
> *(f)* …
>
> *(g)* … E

[65] Section 21(1) and (2), where relevant, read:

> Appeals
>
> 21(1) Any sports body aggrieved by a decision of the Commissioner: F
>
> *(a)* …
>
> *(b)* …
>
> *(c)* in revoking or suspending the registration of such sports body; G
>
> may, within thirty days from the date of notification of the decision of the Commissioner, appeal to the Minister whose decision thereon shall be final.
>
> (2) Before making any decision under subsection (1), the Minister may refer the matter to the Sports Advisory Panel. H

[66] Upon a true construction of the above provisions, it is abundantly clear to me that the revocation of registration of a sports body by the Sports Commissioner under s. 20(1) would give rise to the applicant's right, exercisable within thirty days from the date of the notification of the decision of the Sports I

Commissioner, to appeal to the Minister under s. 21(1). The Minister's decision thereon shall be final. However, before making any decision on the appeal from the Sports Commissioner's decision under s. 21(1), the Minister may refer the matter to the Special Advisory Panel under s. 21(2).

[67] In applying for leave under O. 53 r. 2(2), instead of preferring an appeal to the Minister under s. 21(1), the applicants have not exercised and indeed have abandoned their rights in having chosen not to exhaust the alternative remedy made available to them under s. 21(1).

[68] Are the applicants entitled to do so?. The answer may be ascertained by an analysis of the authorities cited for the parties herein.

[69] In *QSR Brands Bhd, supra,* cited for the applicants, the appellant company was the target company in a take-over bid made by Kulim (Malaysia) Bhd, the second respondent. Being unhappy with this, the appellant's board engaged the Securities Commission, the first respondent, in some correspondence. On 14 October 2005, the Securities Commission wrote, refusing an extension of time for the appellant's board to take the usual steps with regard to the take-over bid in accordance with the Take-Over Code. The appellant then applied for leave to issue judicial review proceeding against the Securities Commission. The High Court refused leave on two grounds *viz*:

(1) that the appellant had failed to exhaust the alternative remedy; and

(2) that the appellant lacked the standing or *locus standi* to make the application.

[70] The appeal against the High Court's leave refusal was dismissed by the Court of Appeal, not on the first ground but on the second ground ie lack of *locus standi.* Hence, the leave refusal *in limine* was affirmed by the Court of Appeal on the second ground.

[71] In relation to the argument based on the first ground ie failure to exhaust an alternative remedy, Gopal Sri Ram JCA enunciated the relevant principles as follows:

(1) Arguments such as the availability of an alternative remedy go to the merits of the substantive application for judicial review and ought never to be dealt with at the leave stage, as the sole question at that stage is whether the application if frivolous: *Mohamed Nordin bin Johan v. Attorney General Malaysia* [1983] 1 CLJ 130; [1983] CLJ 271 (Rep) SC; *JP Berthelsen v. Director General Of Immigration, Malaysia & Ors* [1986] 2 CLJ 409 SC; [1986] CLJ (Rep) 160; and *Tang Kwor Ham v. Pengurusan Danaharta Nasional Bhd* [2006] 1 CLJ 927 CA;

(2) The existence of an alternative remedy does not automatically and without more oust the court's judicial review jurisdiction;

(3) The correct approach is for the judicial review court to take into account the availability of the alternative remedy in deciding whether to exercise its discretion to grant relief on the substantive application;

(4) The discretion is still with the courts, but where there is an appeal provision available to the applicant, *certiorari* should not normally issue unless there is shown:

(a) a clear lack of jurisdiction;

(b) a blatant failure to perform some statutory duty; or

(c) in appropriate cases, a serious breach of the principles of natural justice: *Jagdis Singh, supra;*

(5) An applicant for *certiorari* is not normally obliged to have exhausted his rights of appeal within the administrative hierarchy: *Lai Cheng Cheong v. Sowaratnam* [1983] 1 CLJ 282; [1983] CLJ (Rep) 216 FC; *R v. Postmaster General Exp. Car Michael* [1928] 1 KB 291; nor need an applicant have, before he can apply for that remedy, exhausted his right of appeal to a court of law: *The King v. Wandsworth Justices* [1942] 1 KB 281.

[72] His Lordship concluded "that it is only at the hearing of the substantive motion for judicial review that the existence of an alternative remedy becomes relevant. A *fortiori*, it is a matter which does not fall to be considered on a leave application."

[73] It is to be noted that in relation to the alternative remedy issue, *QSR Brands, supra,* followed the majority judgment of the Court of Appeal delivered by Gopal Sri Ram JCA in *Tang Kwor Ham And Ors v. Pengurusan Danaharta Nasional Bhd* [2006] 1 CLJ 927 where the applicants sought leave to commence judicial review in the High Court. I dismissed the application and refused leave *in limine*: see *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2003] 7 CLJ 205 HC. However, the Court of Appeal allowed the appeal and granted leave to commence judicial review proceedings. On further appeal, in *Pengurusan Danaharta Nasional Bhd v. Tang Kwor Ham & Ors And Another Appeal supra,* the Federal Court reversed the majority judgment of the Court of Appeal. The Federal Court in the judgment delivered by *Alauddin Mohd. Sheriff* FCJ ("the Federal Court judgment") upheld the High Court's leave refusal *in limine.*

[74] The Federal Court was requested to consider three questions of law *viz:*

(1) What is the proper test to be applied in an action for leave for judicial review?

(2) What amounts to a decision of a public authority within the meaning of O. 53 of the Rules of the High Court 1980? and

(3) Does s. 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 oust the jurisdiction of the courts to entertain an application for judicial review?

[75] At the hearing of the appeal before the Federal Court, it was intimated to the parties that the Federal Court would only consider Question 3, to which all parties agreed and counsel made their submissions. The Federal Court answered Question 3 in the affirmative and held in para 52 thereof that the Court of Appeal in granting leave to issue an application for *certiorari* under O. 53 r. 3 had run counter to s. 72 of the Pengurusan Danaharta Nasional Berhad Act 1998 which provides Danaharta with insulation or immunization in the following words:

> Limit on the grant of orders of court.
>
> 72. Notwithstanding any law, an order of a court cannot be granted:
>
> a) which stays, restrain or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

b) which stays, restrains or affects any action take, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,

and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

(see also *Danaharta Urus Sdn. Bhd v. Kekatong Sdn. Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257 FC; [2004] 1 CLJ 701 FC: and *Naga Jaguh Development Sdn. Bhd v. Danaharta Urus Sdn. Bhd* [2005] 3 CLJ 818 HC)

[76] In paras 21, 23 and 24 of the Federal Court judgment, Alauddin Mohd Sheriff FCJ observed that the majority judgment of the Court of Appeal had held that the High Court should not have gone into the merits of the case at the leave stage. His Lordship added that the majority judgment of the Court of Appeal itself went further to consider the merits of the application at the leave stage ie whether the appellant Danaharta was in fact amenable to judicial review.

[77] In the light of the Federal Court judgment, I am of the view that the High Court is at liberty and indeed duty bound to consider any point raised, including the alternative remedy point, at the first stage of leave application under O. 53 r. 3(1). The consideration of whether leave should be granted or refused *in limine* involves an exercise of discretion. That discretion must be exercised according to established judicial principles, having regard to all the facts and circumstances of each particular case.

[78] In this connection, it needs to be observed that where there is an appeal provision available to the applicants herein, *certiorari* should not normally issue unless the applicants can discharge the burden of proving any of the following exceptional circumstances:

(a) there is a lack of jurisdiction on the part of the Sports Commissioner in relation to the decision complained of ie the revocation order;

(b) there is a blatant failure by the Sports Commissioner to perform some statutory duty;

(c) the Sports Commissioner has committed a serious breach of the principles of natural justice, or

(d) illegality. (see *Ta Wu Realty, supra*.)

[79] Upon a proper perusal of the factual background alluded to above, I am of the view that the applicants have failed to establish any of the above exceptional circumstances against the Sports Commissioner. I am unable to find any fact falling within the compass of exceptional circumstances.

[80] Most importantly, the Sports Commissioner by issuing the show cause letter to the applicants had given the applicants an opportunity of being heard. That is clearly in compliance with the fundamental rules of natural justice. On the part of the Sports Commissioner, there is not an iota of a breach, less so a serious breach, of the fundamental principles of natural justice.

[81] Allegations were actually directed against the Minister. However, the Minister is not a party to the proceedings before the High Court nor in the appeal herein. These allegations which the applicants had made against the Minister are in my view irrelevant to the consideration of the application before the High Court and now the instant appeal. Those allegations would only be called into question and consideration, if at all, when there is an application for leave to commence judicial review against the Minister. Until then, I should refrain from venturing any speculation.

Conclusion

[82] As the applicants herein are unable to prove the existence of any of the above exceptional circumstances against the Sports Commissioner, the answer to the question is in the negative. Hence, I hold that the High Court has rightly refused leave *in limine* at the first stage. I therefore dismiss this appeal with costs and affirm the decision of the High Court. Deposit to the Sports Commissioner on account of taxed costs.

Suriyadi Halim Omar JCA:

[83] The appellants had filed a judicial review application, for an order that they be granted leave to apply for an order of *certiorari*, to remove a show cause letter dated 15 April 2005 and to quash the order of revocation of registration of the appellants' association, the Malaysia Taekwando Association (MTA). This

body was the only sports body that was recognized by the World Taekwando Federation to run the World Taekwando style of taekwando, which is a recognized Olympic sport. This order of revocation of registration, dated 6 May was issued by the respondent under s. 20 of the Sports Development Act 1997.

[84] The order of revocation of registration came about as the Sports Commissioner had directed the MTA to amend its constitution, to allow voting rights to clubs, a power of direction which was disputed by the appellants. It is not necessary in this case to detail out the full facts, but suffice to state that the MTA did not give in, resulting in the respondent deregistering the MTA. From the point of view of the appellants they had 2 options, namely, to appeal to the Minister under s. 21 of the Sports Development Act 1997 or to go direct for judicial review. They opted for the latter avenue.

[85] The appellants had sued on their own behalf and on behalf of the said Malaysia Taekwando Association (MTA) pursuant to O. 53 r. 2(4) of the Rules of the High Court 1980. The relevant complete provision reads:

> Application (Order 53 r. 2)
>
> (1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of habeas corpus) shall be in Form III A.
>
> (2) An application for judicial review may seek any of the said relief, including a prayer for a declaration either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter.
>
> (3) Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.
>
> Provided always that the power to grant an injunction shall be exercised in accordance with the provisions of section 29 of the Government Proceedings Act 1948 and section 54 of the Specific Relief Act 1950.
>
> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

A Leave (Order 53 r. 3)

(1) No application under this Order shall be made unless leave therefor has been granted in accordance with this rule.

B (2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.

C **[86]** At the hearing before the High Court the appellants failed to obtain that leave hence the filing of this appeal. In brief the learned judge had held that the judicial review application was premature, and that the appellant must exhaust the domestic remedy first, before proceeding to the court for review. Apart from D disagreeing with the court's above view, the memorandum of appeal also stated that the learned judge had erred in law in failing to make a distinction between the word "may" and "shall," and failing to rule that it was not mandatory to exhaust the remedy of appealing to the Minister let alone there was evidence of the E latter's prejudices. The appellants had also canvassed that this issue of optional judicial review was a point of law and hence substantive in nature which required a full hearing.

[87] The appeal was heard by us and allowed with costs in a F majority decision. I was in the majority. I now lay down my reasons for agreeing to allow the appeal. The supporting statement pursuant to O. 53 r. 3(2) documentarily established the appellants as having the necessary *locus standi.* All 6 appellants indisputably were office bearers of the MTA, the 1st being the chairman, G appellants 2, 3, and 4 as vice-chairmen, the 5th appellant as the secretary and the 6th appellant as the treasurer. The 1st appellant in his affidavit had also affirmed that he had filed the action on behalf of himself and on behalf of the 2nd to the 6th appellants. In other words all had interest and some nexus with the MTA by H virtue of their official position in it. They were interested in the wellbeing of the association and had not filed the application as mere busy bodies or mere cranky public-spirited citizens. Not only had the appellants lost their association but also their respective positions.

I

[88] Elaborating on the *locus standi* issue further, both parties had agreed that the MTA had no legal rights or legal power to file the application. It was an unincorporated body and thus not a legal entity and without any legal personality (*Karting Club of Singapore v. David Mak & Ors* [1985] 2 MLJ 280). That being so the only available solution was for the office bearers to take up the action. In *S. Kulasingam & Anor v. Commissioner of Lands, Federal Territory& Ors* [1982] CLJ 65; [1982] CLJ (Rep) 314 the court had stated:

> First, the Association as such has no standing and is incompetent to sue as a plaintiff. It is a body registered under the Societies Act, and section 9(c) thereof specifically provides that a society may sue in the name of its registered public officer. If there is no member registered as such, but we have not been told that that is so, then we would think that if it was at all necessary for the Association to sue jointly as a plaintiff **a representative claim by one or more of its office-bearers on behalf of all the members would be the solution** (emphasis added).

[89] In this case there was nothing wrong for the 6 of them to file the action on behalf of the other members. In fact even one person would have sufficed. Order 15 r. 12(1) promulgates:

> Where numerous persons have the same interest in any proceedings, not being such proceedings as are mentioned in rule 13, the proceedings may be begun, and unless the Court otherwise orders, continued, by or against any one or more of them as representing all or as representing all except one or more of them.

[90] In support of this representative action, even if there was no outward support for it, p. 424, para. 15.12.5 of the *Malaysian High Court Practice 2003 Desk Edition*, reads:

> The representative plaintiff
>
> > If the plaintiff is claiming on behalf of himself and others (ie, as a representative plaintiff), he may proceed without the consent of the members of the class: *Pan Atlantic Insurance Co & Republic Insurance Co v. Pine Top Insurance Co* [1988] 2 Lloyd's Rep 505 at 509, HC. The fact that there are two opposing factions within a native community does not prevent an action from being a representative action: *Jok Jau Evong & Ors v. Marabong Lumber Sdn Bhd & Ors* [1990] 3 MLJ 427.

[91] That takes care of the preliminary issue as it was clear that they had a standing to take up the action before the court (*Lim Cho Hock v. Speaker Perak Legislative Assembly* [1979] 2 MLJ 85). Needless to say too if the *locus standi* issue were not established the leave application would have died a natural death; this issue may still be resubmitted by the respondents at the substantive hearing stage. A challenge on *locus standi* may be remounted at the subsequent hearing stage perhaps due to some changed circumstance.

[92] The next stage was for the appellants to establish a *prima facie* case for leave, in that their application was not frivolous or vexatious (*George John v. Goh Eng Wah Bros Film Sdn Bhd & 2 Ors* [1988] 1 MLJ 319). Having perused the evidence, apart from a personal interest by the respective appellants who had seen their association and respective positions becoming history, the matter of public interest in this application was quite uppermost for consideration. This factor of public interest, which was submitted at the outset of the hearing, and as a consequence of deregistration by the respondent of the MTA on 1 January 1998, had led to the country being deprived of a Taekwan Do representation at the Doha Meet, the Olympics and some other sporting event. Only by reinstatement as a sports body by the respondent (the Commissioner of Sports Malaysia), would Malaysia have a fighting chance to obtain some glory in international sporting meets, let alone the appellants redeem themselves.

[93] The sister Taekwan Do body registered as the International Taekwan Do Federation could not represent the country as it was not an organization that was recognized by the World Taekwan Do Federation. In a word the intention, the action and the probable positive result that would ensue from a successful reinstatement, could never be construed as frivolous or vexatious. In fact these findings would have sufficed for a High Court judge to grant "order in terms" for the leave application.

[94] As the High Court judge had made certain findings, for the sake of completeness, I would like to touch on them. The High Court judge in her judgment had made much of the issue of domestic remedy in that the judicial review application was premature, whereby the appellants must exhaust it first before being entitled to apply for leave of the court. This was on the

premise that as a *certiorari* order was a discretionary remedy it could be denied by her Ladyship if an alternative remedy was available. I now reproduce the relevant provisions, which had the availability of domestic remedy that led to the view. Sections 20 and 21 of the Sports Development Act 1997 (Act 576) read:

Section 20:

Revocation or suspension of registration by Commissioner

20(1) The Commissioner may revoke or suspend the registration of a sports body if the Commissioner is satisfied that such sports body:

(a) has been registered as a result of a fraud or a mistake or misrepresentation in any material particular;

(b) has failed to comply with any of the conditions imposed by the Commissioner under section 18;

(c) has contravened any provision of this Act or any regulations made thereunder;

(d) is inactive or is no longer a fit and proper entity to be registered to represent its sport in any State or in Malaysia;

(e) is hindering the development of the particular sport and it is in the public interest to revoke or suspend its registration;

(f) has failed or neglected to remedy any malpractice, misconduct or irregularity on the part of its office bearers or its members within the period specified in the written notice given by the Commissioner; or

(g) is inactive, unco-operative or obstructive in the implementation of the regulations, policies or guidelines made under or pursuant to powers under this Act.

(2) Before revoking or suspending the registration of a sports body under subsection (1), the Commissioner shall give the sports body an opportunity to submit reasons, if any, against the proposed revocation or suspension.

Appeals

S. 21(1) Any sports body aggrieved by a decision of the Commissioner:

(a) in refusing to register such sports body;

(b) in imposing conditions on the registration of such sports body; or

A (c) in revoking or suspending the registration of such sports body, may, within thirty days from the date of the notification of the decision of the Commissioner, appeal to the Minister whose decision thereon shall be final.

(2) Before making any decision under subsection (1), the
B Minister may refer the matter to the Sports Advisory Panel.

[95] The court, founded on the above s. 21, had opined that by so not appealing to the Minister within 30 days of the Commissioner's decision, such failure must be viewed unsympathetically. In the
C *Government of Malaysia & Anor v. Jagdis Singh* [1987] 1 CLJ 451; [1987] CLJ (Rep) 110 the Supreme Court also had held that:

> The first principle to note is that *certiorari* is a discretionary remedy primarily concerned with the prevention of excess or abuse of power rather that the final determination of individual
D rights. The jurisdiction is sometimes referred to as an "extraordinary" original jurisdiction of the High Court, supervisory in character rather than appellate or revisionary …
>
> There is said to be a subsidiary rule to the effect that *certiorari* is not normally issued if the applicant has an alternative remedy
E available to him because the rationale is that he should first make use of the domestic remedy provided for him instead of invoking the writ jurisdiction.

[96] *Khoo Ah Imm @ Chang Bee Kiam & Ors v. Datuk Bandar*
F *Kuala Lumpur & Anor* [1997] 3 CLJ 519 had occasion to state that:

> Now, it is well settled that *certiorari* is one of those remedies in public law which cannot be claimed *ex debitio justitiae*, but is a discretionary remedy. An applicant who makes out a case may yet
G be denied the remedy on a number of grounds, depending on the facts and circumstances of each case ….
>
> One of the grounds on which the remedy of *certiorari* may be withheld is where the supplicant is able to obtain better or at least equally efficacious relief either in other proceedings or at an
H alternative forum. Sometimes, the alternative remedy is given by statute …

[97] The above was the law of the day as regards the remedy of *certiorari.*

I

[98] The respondent in its submission had come out rather strongly when it *inter alia* submitted:

> The process envisaged by Parliament clearly intends the remedying of any matter related to sports development in the country to be dealt with in accordance with the processes prescribed. Any appeal against any appeal against any decision of the Sports Commissioner is to be dealt with by the Minister who is aided by a Sports Advisory Panel. This Sports Advisory Panel is empowered to make recommendations to the Minister. If persons, assuming the Appellants are even for one moment can be said to be within that category can come to court without having first pursued the matter in the manner intended by Parliament, it can be said that Parliament may have legislated in vain. Matters concerning sports, its development and its administration were wisely considered by Parliament to be better resolved outside the realm of the courts until the appropriate moment.

[99] As said above, the High Court had found itself bound by the above legal pronouncements and the strong submission by the respondent, more so when s. 21 was supposedly quite succinct in its contents. The court had concluded:

> With regards to the various grounds of objection raised by the learned Senior Federal Counsel, in relation to the leave application, I am of the opinion that one issue alone would suffice for this court to decide whether leave for the judicial review ought to be granted in particular the non-exhaustion of remedies. From the submissions made by both parties I am inclined to agree with the learned Federal Counsel that the applicants failed to make use of the domestic remedy provided for under the Sports Development Act 1997. To my mind the application before me is premature. It is explicit that s. 21(1)(c) of the said Act provides that any sports body aggrieved by a decision of the Sports Commissioner in revoking its registration may appeal to the minister within 30 days of the notification of the Commissioner's decision. I am also of the view that it is improper at this stage to assume that the minister has prejudged the matter and therefore prejudiced at this early stage. I am also in agreement with the learned Federal Counsel that Parliament's intention is provided for in Act 576 and in the exercise of my discretion and for the reasons above, I hereby refused leave and dismissed the application with costs.

[100] As regards the law pertaining to a *certiorari* being a discretionary remedy, and the consequential actions to be undertaken subsequently, especially when there is a domestic remedy at hand after leave has been obtained, I have no quarrel with it as reproduced above. The all paramount question in this

A case is, must the issue of domestic remedy be canvassed and decided by the judge at this early stage ie, at the stage of the leave application? Before discretion is to be applied a judge must be apprised of all the facts first. Nothing must be arbitrary. Here the scenario was as follows: the judge had no affidavit in reply to
B peruse and consider, an incomplete set of evidential and legal argument regarding the factor of domestic remedy, the appellants were harping on some other equally serious issue let alone supported by evidence that the Minister could be biased, to expect the judge to apply his discretion correctly then (as regards
C the issue of alternative remedy), was an unreasonable expectation.

[101] In fact as there was no affidavit in reply the appellants should have won hands down in the circumstances of the case. Surely the purpose of leave would be defeated if such a
D substantive matter such as this must be resolved at such an early stage. Recently too, in *QSR Brands Bhd v. Suruhanjaya Sekuriti & Another* [2006] 2 CLJ 532 the Court of Appeal, when dealing with a similar issue, had ruled that the question of exhaustion of domestic remedy was not an issue at the leave stage. The issue
E of alternative remedy went to the merit of the substantive application, with the court only to gauge whether the application before it was frivolous or not.

[102] The appellants in the course of the appeal had stated that
F the wording of s. 21 was such that it was open to another interpretation, in that the court was an alternative remedy to that of a decision by a Minister. This submission was legalistic and could not be brushed off off-handedly. Nothing was stated that the doors of the court were shut in the circumstances of the case,
G especially when the Minister, *prima facie* as per the newspaper cuttings, holding the same view as the respondent had already directed the MTA to amend the constitution, a partial stance which did not bode well for the appellants. Whether this interpretation of the appellants was correct or otherwise, similarly
H as in the above explanation, should only be resolved at the stage after leave had been granted and not before. It was substantial enough to deserve a full blown hearing.

[103] For the reasons supplied I had allowed the appeal with costs.

I